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Appearing Pro Se

**UNITED STATE BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

vs.	) Case No.: BK-S-06-10725-lbr
	)
USA Commercial Mortgage	) Chapter 11
	)
Company,	) MOTION FOR SUMMARY JUDGMENT ON
	) PROOF OF CLAIM 10725-01876
Debtor	) BASED ENTIRELY UPON INVESTMENT
	) IN THE TAPIA RANCH LOAN, AND
	) OTHER CLAIMS
	)
	) Date of Hearing August 30, 2011
	)
	) Time of Hearing: 10:30 AM
	)

Arthur I. Kriss, Claimant, hereby files this Motion for Summary Judgment on Proof of Claims 10725-01876, the Tapia Ranch Loan, and other claims.

**BACKGROUND:**

1. The Court having considered the "Second Omnibus Objection of USACM Trust to Proofs of Claim based entirely upon investment in the Tapia Ranch Loan [DE 8523] on July 26, 2011; and the Court having considered the response filed by Arthur I. Kriss [DE 8610], and having ordered a continued hearing be held on August 30, 2011 at 10:30 AM on the Proof of Claim 10725-01876.

1 2. The Court, further having Ordered [DE 8877] a Scheduling  
2 Conference for October 11, 2011 at 2:00 PM, and setting of  
3 a Trial date of October 21, 2011 for a trial combining all  
4 Claims (including those that have not been objected to)  
5 filed by Arthur I. Kriss to include Proof of Claims 10725-  
6 01874, 10725-01875, 10725-01876 - Tapia Ranch, and 10725-  
7 01877, respectfully begs the Court to REMAND the Order for  
8 Trial, and to consider this Motion for Summary Judgment on  
9 the Claims 10725-01874, 10725-01875, 10725-01876, and  
10 10725-01877.

11 **Introduction:**

12 1. The Claimant/Movant, Arthur I. Kriss is, like the Trustee  
13 (and probably the Court) very much interested in bringing  
14 these Claims to a just close in as efficient a manner as  
15 can be had. Hearings having been held on both the Anchor B  
16 and Tapia Ranch claims, and this continued hearing on the  
17 Tapia Ranch Claim perhaps sets forth an opportunity to  
18 address all the claims at the same time; similar to the  
19 manner in which the Trustee proposed in his application to  
20 combine the trials on all claims. At the Status Hearing of  
21 July 26, 2011, Mr. Charles, of Lewis and Roca, Attorney for  
22 the Trustee made a proposal to combine the trials of the  
23 subject Claims into a single trial. Mr. Kriss, in an  
24 effort to cooperate with the Trustee and minimize the costs  
25 associated with the trials concurred. However, upon

1 reflection on the matter and the dramatically different  
2 circumstances surrounding the loans, Mr. Kriss has  
3 determined that because of the differences in each loan  
4 (claim) it would be extraordinarily difficult and confusing  
5 to review for discovery each of the loan files  
6 individually; and prepare, and present evidence to the  
7 Court on each individual claim at a single trial. For  
8 example; Claim 10725-01874 re Clear Lake is much like the  
9 other loans; 1) predicated on the failure of USACM to  
10 enforce the provisions of the LSA, and 2) is further based  
11 upon the fact that USACM took my money for the investment  
12 even though the existing Clear Lake loan at the time was in  
13 default; 3) did not disclose the same to me; and 4) neither  
14 did the principles of USACM disclose their personal  
15 interest/relationship with the borrower in the investment.  
16 The Anchor B and other loan circumstances are significantly  
17 different. Nonetheless, the objections to the claims are  
18 very much alike and the reasons why the objections should  
19 be overridden are much alike. Thus, this proposal and  
20 Motion for Summary Judgment in accordance with FRCP Rule 56  
21 on all the Claims.

22  
23 **STATEMENT OF FACTS:**

- 24 1. The Trustees objections (thus far) to the Proofs of  
25 Claim filed by me are essentially the same as to

1 form and substance; that the direct lenders took a  
2 known risk by investing in a promissory note secured  
3 by a lien on real property, that USACM is not liable  
4 for the default and did not guarantee repayment of  
5 the Notes, and that "USACM does not appear to have  
6 breached the loan servicing agreements with respect  
7 to collection on the Notes".

8 2. I readily acknowledge the risk associated with  
9 investments of any kind, and assume those risks,  
10 sometimes with trepidation. However, the risks one  
11 takes when making an investment also assumes that  
12 the broker of the investment is honest, and an  
13 independent third party. The investment is judged  
14 on its merits, and USACM was assumed to be an honest  
15 broker. I had made several previous investments  
16 with USACM which were successful. They were properly  
17 licensed by the State of Nevada and there were no  
18 Notices of impending problems with the business and  
19 the business was in good standing when I made the  
20 investments. I contend that the Trustee's objection  
21 is unsubstantiated.

22 3. It is further readily acknowledged that USACM did  
23 not guarantee repayment of the Notes, and is  
24 probably not directly responsible for the default,  
25 though when they declared bankruptcy, they announced

1 to the world that they were in trouble and could not  
2 be easily sued by their borrowers for any  
3 wrongdoing, and that a default by a borrower would  
4 probably not be pursued, which is apparently what  
5 happened in these loans. I contend that the  
6 Trustee's objection is unsubstantiated, though I  
7 would agree that the default is not wholly caused by  
8 USACM.

- 9 4. As to the matter of **"does not appear to have breached**  
10 **the Loan Servicing Agreement"**. These Claims are all  
11 primarily about Breach of the Loan Servicing  
12 Agreement (Contract) [Exhibit 1], in that USACM did  
13 not conform to the provisions of the LSA (contract)  
14 concerning their duties and responsibilities to  
15 perform certain actions upon default by the  
16 borrowers; Breach of Fiduciary Duty, and violations  
17 of Nevada law. As noted in [DE 8609] re Anchor B, a  
18 **Contract** (Loan Servicing Agreement) is a legally  
19 enforceable Agreement between two or more parties  
20 with mutual obligations. The remedy at law for  
21 breach of contract and Fiduciary Duty is **"damages"**  
22 or monetary compensation. In this certain case,  
23 because legal action against the offending party is  
24 not possible due to the bankruptcy filing, damages  
25 cannot be pursued and therefore Claims against the

1 Estate in Bankruptcy Court are the proper forum for  
2 recovery.

3 (a.) The Contract (LSA) specifies certain explicit  
4 duties (services) that USA will perform.

5 (b.) Re: C. 2. (c) "Until the total amount due under  
6 each note is paid in full":

7 (i) Proceed **diligently** to collect all payments  
8 due under the terms of the note.... "**diligently**":  
9 *persevering, the attention and care legally*  
10 *expected or required characterized by steady,*  
11 *earnest, and energetic application and effort.*  
12

13 (ii) In the event the Borrower fails to make any  
14 payment to USA as required, **USA will take steps**  
15 **to collect payment.....to fully protect the**  
16 **interests of the Lender**, and of all Lenders in  
17 the loan.

18 (c.) I would contend that the Trustee has not  
19 substantiated the assertion that "USACM did not  
20 appear to have breached the loan servicing  
21 agreement".  
22

23 (d.) USA / USACM / Mr. Allison (appointed by the  
24 Court on April 17, 2006) had an absolute responsibility  
25 to pursue all legal options to protect the Lenders

1 interests in the note and failed to do so. The failure  
2 of USA / USACM/ Allison (MIFM) to act on this matter  
3 actually extended from before the bankruptcy (pre-  
4 petition) occurred to February 16, 2007, the closing  
5 date of the sale to Compass. I would contend Mr.  
6 Allison may be somewhat complicit as he audited the  
7 accounts prior to the bankruptcy. This failure to act  
8 can only be attributed to deliberate negligence on the  
9 part of management of USA/USACM. The Contract / LSA  
10 clearly defines the scope of responsibility and gives  
11 full authority to the Servicer to take any and all  
12 necessary actions to protect the Lenders interest.

13  
14 (e.) The LSA in Paragraph C. 4, Legal Proceedings,  
15 provides for and guarantees payment / repayment of  
16 funds expended by USA in pursuit of actions to protect  
17 the Lender interests. Therefore, the matter of  
18 expenses for USA to perform could not have been an  
19 issue.

20  
21 (f.) "Allison shall have complete and exclusive charge  
22 of the management and operation of the business" (Court  
23 Order appointing Allison). Therefore, there is no excuse  
24 for the failure of USA / USACM / Allison (MIFM) to conform  
25 to the provisions of the Contract / LSA.

5. Violations of Nevada Revised Statutes:

- a. NRS-645B.175: Regulations concerning Trust accounts as a depository of funds belonging to others: USA apparently kept multiple sets of books/accounts and issued fraudulent payments.
- b. NRS-645B.250: Prohibition on advancing payments to investor on behalf of debtor in default; i.e. advance interest payments. This action violated the provisions of the Loan Servicing Agreement by covering up the Default.
- c. NRS-645B.186: Disclosure of business relationships.

**SUMMARY:**

1. USA/USACM, pre-bankruptcy, fraudulently diverted funds from other funds/resources to hide/cover the pre-bankruptcy default of the Anchor B and other loans.
2. This fraudulent diversion of funds was the first step of many steps taken (not taken) by USA / USACM / Allison (MIFM) that ultimately led to the loss of my investment.
3. Pre-petition and post petition actions by USA / USACM / Allison / MIFM to simply ignore the contractual requirements of the LSA to protect the interests of the Lenders through foreclosure, or pursuit of the personal guaranties for more than one year became the predicate to the loss of my investment. The emphasis by

1 USACM/MIFM was almost totally directed toward preparing  
2 the portfolio of loans for sale, and the uncollected  
3 Notes and guaranties were a large part of the pie that  
4 was to be sold, and which in fact was sold.

5 4. Failure to disclose business relationship on the Clear  
6 Lake loan, and fraudulently taking investment money for  
7 a loan already in default.

8 5. Even though Compass became the Servicer of record with  
9 the closing of the sale of USA's contract rights  
10 relative to the LSA's, the damage had been done. The  
11 Borrower(s) walked away from the loans and the Court  
12 sold the loan assets to Compass.

13 6. For the Trustee to even suggest that "the Direct  
14 Lenders fail to state a claim because USACM does not  
15 appear to have breached the loan servicing  
16 agreements...", is difficult to comprehend. All of the  
17 evidence points to negligence. I had four loans which  
18 have all failed, and not a shred of evidence exists to  
19 indicate that USACM pursued collection on the notes, or  
20 attempted to recover funds from the personal or  
21 corporate guarantees.  
22

23 7. There is no "genuine dispute" as to any of the material  
24 facts on any of the four loans. The Trustee fails to  
25 substantiate his statement asserting that "USACM does

1 not appear to have breached the LSA" [Rule 56 (c) (1)  
2 and (e)].

3 **Conclusion:**

4 In accordance with the provisions of the FRCP Rule 56, I  
5 respectfully request the Court grant Summary Judgment on  
6 the four claims I have filed, or alternatively grant  
7 Summary Judgment on the Tapia Ranch 10725-01876 claim  
8 alone, and allow regular order on the remaining claims.  
9

10 Dated this 24<sup>th</sup> day of August 2011

11  
12 By: Arthur I. Kriss  
13 Arthur I. Kriss  
14 Pro Se

15 Copy to:

16 Lewis & Roca, Attention: John Hinderaker & Robert Charles, Jr.  
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